

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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AZURE MANOR/RANCHO DE PAZ  
HOMEOWNERS ASSOCIATION,

Plaintiff(s),

v.

D.R. HORTON, INC.,

Defendant(s).

Case No. 2:14-CV-2222 JCM (NJK)

ORDER

Presently before the court is a motion for relief from an order, and in the alternative, a motion for reconsideration, submitted by plaintiff Azure Manor/Rancho De Paz Homeowners Association (“HOA”). (Doc. # 13). Defendant D.R. Horton, Inc. (“D.R. Horton”) filed a response, (doc. # 14), and plaintiff filed a reply, (doc. # 15).

**I. Background**

Plaintiff in this case is the homeowners association for the Azure Manor/Rancho De Paz community in Clark County, Nevada. (Doc. # 2 at 3). Plaintiff, in its representative capacity, brought suit in Nevada state court against D.R. Horton, one of the community’s builders, alleging construction defects. (Doc. # 2 at 3). Plaintiff brought this action as a single-family home class action suit. (Doc. # 2 at 3).

D.R. Horton removed the action to this court. (Doc. # 1). On January 07, 2015, it filed a motion to stay litigation and to dismiss plaintiff’s class action allegations. (Doc. # 5). In this motion, D.R. Horton argued that plaintiff failed to meet the various notice requirements for construction defect claims established by N.R.S. chapter 40 and asked this court to stay the case until plaintiff complied with the statutory requirements. (Doc. # 5 at 5–6). Additionally, D.R.

1 Horton argued that a class action suit is inappropriate for constructive defect claims for single-  
 2 family homes and asked this court to dismiss the portion of plaintiff's complaint related to the  
 3 class action allegations. (Doc. # 5 at 7–10).

4 Plaintiff's response to D.R. Horton's motions was due January 26, 2015. (Doc. # 13 at 4).  
 5 After plaintiff failed to file its response on this date, this court issued an order on January 27,  
 6 finding that this failure constituted plaintiff's consent to granting D.R. Horton's motion and that a  
 7 weighing of the *Ghazali* factors supported dismissal of plaintiff's claims. (Doc. # 11; *see Ghazali*  
 8 *v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995)). Accordingly, this court dismissed plaintiff's complaint  
 9 without prejudice. (Doc. # 11).

10 Plaintiff now moves for relief from this order pursuant to F.R.C.P. 60(b)(1). In the  
 11 alternative, plaintiff moves for reconsideration of this order.

## 12 **II. Legal standard**

13 Under Rule 60(b), a court may relieve a party from a final judgment, order or proceeding  
 14 only in the following circumstances: (1) mistake, inadvertence, surprise, or excusable neglect; (2)  
 15 newly discovered evidence; (3) fraud; (4) the judgment is void; (5) the judgment has been satisfied;  
 16 or (6) any other reason justifying relief from the judgment. *Stewart v. Dupnik*, 243 F.3d 549, 549  
 17 (9th Cir. 2000); *see also De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 880 (9th Cir.  
 18 2000) (noting that the district court's denial of a Rule 60(b) motion is reviewed for an abuse of  
 19 discretion).

## 20 **III. Discussion**

21 Plaintiff makes a variety of arguments as to why this court should either grant plaintiff  
 22 relief from its earlier order dismissing plaintiff's complaint or otherwise reconsider the order: (1)  
 23 this court did not have jurisdiction over this claim; (2) the totality of the circumstances support  
 24 this court's permissive withdrawal of plaintiff's consent to defendant's motion to dismiss; (3)  
 25 plaintiff's failure to meet the response deadline satisfies the "mistake, inadvertence, surprise, or  
 26 excusable neglect" standard for Rule 60(b)(1); and (4) the court's consideration of the *Ghazali*  
 27 factors was incorrect and dismissing plaintiff's claims will lead to an injustice.

1 For reasons set out below, the court will grant plaintiff's motion for relief on the premise  
 2 that plaintiff's failure to respond to D.R. Horton's motion constituted "excusable neglect" under  
 3 Rule 60(b). Accordingly, the court will only address this argument, as well as plaintiff's  
 4 overarching arguments as to whether this court has jurisdiction to hear this claim.

#### 5 **A. Jurisdiction**

6 Plaintiff asserts two arguments to why this court lacks jurisdiction to hear this claim: (1)  
 7 D.R. Horton's process for removing this case from state to federal court was improper, and (2)  
 8 plaintiff anticipates adding multiple Nevada subcontractors as defendants to its complaint, thus  
 9 destroying the complete diversity requirement for subject matter jurisdiction.

##### 10 **1. Failure to properly remove the case from state to federal court**

11 In regards to removal, plaintiff argues that D.R. Horton failed to satisfy the requirements  
 12 for removing an action from state to federal court by not filing a copy of the notice of removal  
 13 with state court. 28 U.S.C. § 1446(d) ("Promptly after the filing of such notice of removal of a  
 14 civil action the defendant or defendants shall . . . file a copy of the notice with the clerk of such  
 15 State court, which shall effect the removal and the State court shall proceed no further unless and  
 16 until the case is remanded.").

17 D.R. Horton admits it filed such notice with Nevada state court after receiving plaintiff's  
 18 instant motion. (Doc. # 14 at 5). However, D.R. Horton argues that the Ninth Circuit has found  
 19 that a "*de minimis* procedural defect [is] curable" even after expiration of the thirty-day removal  
 20 period." *Kuxhausen v. BMW Fin. Servs. NA LLC*, 707 F.3d 1136, 1142 (9th Cir. 2013) (finding  
 21 that the defendant's failure to attach a copy of plaintiff's complaint to the notice of removal  
 22 pursuant to §1446(a) is a *de minimis* procedural defect that does not warrant remand). To support  
 23 this argument, D.R. Horton points to the facts that its delay in filing such notice was only thirty-  
 24 three days and that the state court took no action in the intervening period. (Doc. # 14 at 5). The  
 25 court agrees with this reasoning and finds that defendant's error was *de minimis* and does not affect  
 26 the court's ability to hear this claim.

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1                                   **2.       Lack of diversity jurisdiction**

2           Plaintiff additionally asserts that once discovery commences, there are likely dozens of  
3 subcontractors that it will name as additional parties (Doc. # 13 at 9–10). Since most if not all of  
4 these subcontractors will be citizens of Nevada, the addition of any of these parties would defeat  
5 the complete diversity requirement for diversity jurisdiction. *See* 42 U.S.C. § 1332; *Strawbridge*  
6 *v. Curtiss*, 7 U.S. 267 (1806).

7           Regardless of plaintiff’s anticipation of adding non-diverse parties in the future, the  
8 diversity requirement is based on the diversity of the parties “at the time the action is removed to  
9 federal court.” *See Miller v. Grgurich*, 763 F.2d 372, 373 (9th Cir. 1985) (*citing* C. Wright, *Law*  
10 *of Federal Courts* § 38, at 153 (3d ed. 1976); 14A C. Wright, A. Miller & E. Cooper, *Federal*  
11 *Practice and Procedure* § 3723, at 311 (2d ed. 1985)). Because plaintiff did not challenge the  
12 diversity of the parties at the time defendant removed this action and has not since added non-  
13 diverse parties, this court has jurisdiction over this claim.

14                                   **B.       Excusable neglect under Rule 60**

15           Plaintiff explains that it failed to file a timely response to D.R. Horton’s original motion,  
16 because plaintiff “mistakenly calendared” the deadline for January 29, 2015, the same deadline for  
17 another matter D.R. Horton sought to consolidate with this case. (Doc. # 13 at 4). Plaintiff argues  
18 that such an error satisfies the grounds for relief from an order stated in Rule 60: “mistake,  
19 inadvertence, surprise, or excusable neglect.” Fed. R. Civ. P. 60(b)(1).

20           In clarifying this standard, the Supreme Court has held that “excusable neglect covers  
21 situations in which the failure to comply with a filing deadline is attributable to negligence.”  
22 *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1222 (9th Cir. 2000) (quoting *Pioneer Inv. Servs.*  
23 *Co. v. Brunswick Associates Ltd. P’ship*, 507 U.S. 380, 395(1993) (internal citation marks omitted).  
24 This “determination . . . is an equitable one that depends on at least four factors: (1) the danger of  
25 prejudice to the opposing party; (2) the length of the delay and its potential impact on the  
26 proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith.” *Id.* at  
27 1223 (citing *Pioneer*, 507 U.S. at 395). The Ninth Circuit has further explained “that the factors  
28 recited in *Pioneer* [are] not exclusive, but that they ‘provide a framework with which to determine

1 whether missing a filing deadline constitutes ‘excusable’ neglect.’” *Id.* at 1224 (quoting *Pioneer*,  
 2 507 U.S. at 381).

3 In *Bateman v. U.S. Postal Service*, the plaintiff’s attorney knew that a response was due  
 4 for defendant’s motion for summary judgment on August 21, but he left the country on August 10  
 5 due to a family emergency without filing a response or seeking an extension from the court. *Id.* at  
 6 1223. A week after the deadline past, the defendant moved for the district court to grant the motion  
 7 as unopposed. Although the plaintiff’s attorney returned to the U.S. on August 29, he waited an  
 8 additional sixteen days to contact the court or the opposing party to explain his absence. *Id.* The  
 9 attorney later attributed this delay to the recovery of jet lag and the time it took to sort through the  
 10 mail that had accumulated. *Id.* In the interim, the court issued an order granting summary judgment  
 11 in favor of the defendant. *Id.* The attorney eventually filed a Rule 60(b) motion, which the district  
 12 court denied.

13 On appeal, the Ninth Circuit applied the *Pioneer* factors stated above and found that the  
 14 attorney’s conduct did constitute excusable neglect and that the plaintiff was accordingly entitled  
 15 to Rule 60(b)(1) relief. *Id.* at 1224. The court found that the danger of prejudice to the defendant  
 16 was “minimal,” since “it would have lost a quick victory” if the Rule 60(b) motion was granted.  
 17 *Id.* at 1124–25. Furthermore, the court found that the “length of delay, and its potential impact on  
 18 the judicial proceedings, was also minimal.” *Id.* at 1225. The attorney wrote to the court twelve  
 19 days after it granted summary judgment, asking the court to rescind its decision, and then filed his  
 20 Rule 60 motion one month after the court’s decision. *Id.* The court found that this period was “not  
 21 long enough to justify denying relief,” especially since discovery had only closed in August and  
 22 the delay would not have likely postponed the trial. *Id.* Although the court did find that the  
 23 attorney’s reason for the delay was “weak,” it found that “there [was] no evidence that he acted  
 24 with anything less than good faith.” *Id.*

25 In this case, plaintiff’s counsel admits that the failure to timely file the timely response to  
 26 defendants’ motion to dismiss is solely the fault of counsel because of a calendaring issue. The  
 27 court does not take lightly counsel’s failure to observe and adhere to deadlines. However, the  
 28 court’s intent in dismissing this action without prejudice was to preserve plaintiff’s claims despite

1 counsel's dilatory behavior. Now counsel represents that dismissal without prejudice would bar  
2 action by plaintiff under the applicable statute of limitations.

3 The court finds that dismissal of plaintiff's action without an opportunity to respond to  
4 defendant's motion to dismiss would unjustly prejudice plaintiff. Applying the *Pioneer* factors to  
5 the instant case, the court finds that plaintiff's calendaring error constitutes excusable neglect. Like  
6 in *Bateman*, there is no evidence that Rule 60 relief would prejudice D.R. Horton in any way other  
7 than removing its "quick victory." Conversely, plaintiff argues that it would be greatly prejudiced  
8 if this court denied Rule 60 relief, because plaintiff filed its claim just before the ten-year statute  
9 of limitations expired for several of the homes which closed escrow towards the end of 2004. (Doc.  
10 # 13 at 16). Although this court dismissed plaintiff's claim without prejudice, plaintiff argues that  
11 this time bar might preclude claims for such homes. While D.R. Horton counters with the fact that  
12 plaintiff has not identified which homes would actually be precluded, the factor does contemplate  
13 the "danger of prejudice." *Bateman*, 231 F.3d at 1224. The court finds that there is a danger of  
14 prejudice to plaintiff if Rule 60 relief is not granted.

15 Furthermore, the length in the filing delay here was extremely minimal. Plaintiff filed its  
16 Rule 60 motion on January 31, 2015, five days after the response deadline and four days after this  
17 court dismissed its complaint. (Doc. #13 at 4). Such a delay is far more reasonable than the twelve  
18 days the attorney in *Bateman* took to contact the court after summary judgment was granted, along  
19 with the additional month to file his motion after the court's reply. Furthermore, the calendaring  
20 mistake in the instant case was a far more reasonable excuse for the delay than the Bateman's  
21 attorney's jetlag and backlogged mail. Finally, there is no evidence that plaintiff acted in less than  
22 good faith. Since each of the *Pioneer* factors weighs in plaintiff's favor, this court will grant its  
23 motion for Rule 60 relief.

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1 **IV. Conclusion**

2 Based on the analysis above, the court will grant plaintiff's motion for Rule 60 relief from  
3 the court's January 27, 2015, order dismissing the plaintiff's complaint without prejudice.

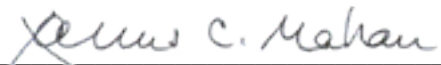
4 Accordingly,

5 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff's motion for  
6 Rule 60 relief, (doc. # 13), be, and the same hereby is, GRANTED.

7 IT IS FURTHER ORDERED that the clerk of court shall reopen this case.

8 IT IS FURTHER ORDERED that plaintiff shall file a response to defendant's motion to  
9 dismiss, (doc. # 6), within fourteen days of the entry of this order.

10 DATED June 10, 2015.

11   
12 UNITED STATES DISTRICT JUDGE